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No. 97-___

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM H. SEALS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress may, consistent with Article III and the separation-of-powers doctrine, transfer functions Article III judges traditionally perform in supervising grand juries to a non-Article III court without providing for any review by an Article III court.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the District of Columbia Circuit were petitioner William H. Seals, appellant below, Gary W. Sweatt, another appellant, and the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William H. Seals respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 130 F.3d 451 (D.C. Cir. 1997). The district court's ruling (App. 24a) was announced from the bench and is unreported.

JURISDICTION

The D.C. Circuit issued its opinion on December 5, 1997. Judgment was entered the same day, and a petition for rehearing (App. 26a) was denied on February 10, 1998. This Court has jurisdiction over this petition under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the Constitution of the United States provides in pertinent part:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, received for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const., art. III, § 1. Other pertinent constitutional and statutory provisions are reprinted in the appendix.

STATEMENT

This case raises questions of fundamental importance concerning Article III and the doctrine of separation of powers. Congress has authorized grand juries sitting in the District of Columbia Superior Court and supervised by the Article I judges of that court to return federal indictments. *See* D.C. Code §11-1916(a). As the decisions

made by Superior Court judges in supervising these grand juries are not reviewable in federal court, the exercise of this authority raises the question whether Congress may assign a traditional judicial function in a federal case to a non-Article III tribunal without providing for review by an Article III court. In addition, as the only justification offered in the decision below for this intrusion upon the power of the federal courts is that it promotes the efficient use of the jury pool in the District of Columbia, the decision below also raises the question whether mere convenience or efficiency may justify an intrusion upon the powers of the Judiciary.

This case arises out of the alleged kidnapping of one Michael Fullwood. On August 2, 1995, petitioner William H. Seals and a co-defendant were arrested by agents of the Federal Bureau of Investigation for kidnapping Mr. Fullwood and seeking a ransom in return for his release. App. 1a-2a. Suspecting that Mr. Fullwood participated voluntarily in the alleged kidnapping, FBI agents gave Mr. Fullwood a *Miranda* warning and a polygraph examination. Trial Transcript at 916-17, 997-98. Mr. Fullwood failed the test. At the very beginning of the examination, the examiner asked, "Did you plan with anyone else [] your abduction?" *Id.* at 1689. Although Mr. Fullwood responded that he did not, the polygraph "indicated deception." *Id.* at 1698-90. The polygraph also indicated deception when Mr. Fullwood asserted that he had been held against his will. *Id.*

In light of this polygraph examination, the U.S. Attorney for the District of Columbia initially declined to bring federal charges against petitioner. Declaration of Oliver W. McDaniel, April 5, 1996, ¶¶ 1-3 (attached to Gov. Opp. to Def. Motion to Dismiss). Instead, exercising his authority to prosecute major violations of District of Columbia law, *see* D.C. Code § 23-101(c), the U.S. Attorney arraigned petitioner in the Superior Court for the District of Columbia on local charges. App. 2a. Later, the U.S. Attorney reversed his decision and transferred the case to federal court. McDaniel Decl. ¶¶ 5-8. Because the U.S. Attorney had already begun to present evidence to a grand jury sitting in the District of Columbia Superior Court, he decided to continue before that grand jury to "conserve on available resources." *Id.* ¶ 8.

Before trial, petitioner and his co-defendants challenged the constitutionality of D.C. Code §11-1916, the statute authorizing the Superior Court grand jury to return a federal indictment. *See* D.C. Code §11-1916(a) ("A grand jury serving in the District of Columbia may take cognizance of all matters brought before it regardless of whether an indictment is returnable in the Federal or District of Columbia courts.") As the judges of the District of Columbia Superior Court are not Article III judges and do not enjoy Article III's tenure and salary guarantees, *see Palmore v. United States*, 411 U.S. 389, 398-99 (1973); *id.* at 411-12 (Douglas, J., dissenting), petitioner argued that Section 1916 violates both Article III and the separation-of-powers doctrine by permitting the judicial functions performed in supervising grand juries issuing federal indictments to be transferred from the Article III judges of the United States District Court for the District of Columbia to the Article I judges of the Superior Court. The trial court rejected this argument without considering either Article III or the separation-of-powers doctrine, holding instead that Section 1916 was authorized by Congress' "plenary authority over D.C." App. 24a-25a.

On appeal, the D.C. Circuit affirmed, but on different grounds. In an opinion by Judge Karen LeCraft Henderson, the court of appeals found the judicial role in the grand jury process to be of little significance because it is focused upon the grand jury's investigative role and upon issues such as compelling testimony and production of documents, quashing or modifying subpoenas, and considering immunity requests. App. 10-11a. The decision below then analyzed the constitutionality of the transfer of these judicial functions under the four-part balancing test formulated in *Commodity Futures Trading Common v. Schor*, 478 U.S. 833 (1986).[1] The decision found that (1)

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[1] Under that test, four factors are examined:

> [1] the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, [2] the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, [3] the origins and importance of the right to be adjudicated, and [4] the concerns that drove Congress to

Section 1916 does not implicate any "essential attribute" of the judicial power because the judicial role in the grand jury process is limited (App. 11a); (2) Section 1916 involves only a limited sharing of the judicial power because "[a]n Article III judge continues to preside at the defendant's trial and retains his authority to dismiss an indictment" (App. 14a); (3) the "grand jury's reliance on a judge for subpoenas, immunity orders, and the like is a relatively recent development" (App. 15a); and (4) Section 1916's intrusion upon the power of the federal judiciary is justified because it promotes the efficient use of the limited jury pool in the District of Columbia (App. 16a). The panel also held that Congress' plenary authority over the District of Columbia "fortifies our holding." App. 17a.

Because petitioner did not have an opportunity to address many of these arguments, which were neither advanced by the Government nor raised by the court below at oral argument, he sought rehearing. The petition for rehearing identified a number of errors in the panel's opinion:

- Both this Court and the D.C. Circuit have previously recognized that the power to subpoena evidence and to punish the failure to produce documents or testify for contempt is an essential, and exclusive, attribute of the judicial power. *See, e.g., ICC v. Brimson*, 154 U.S. 447, 485 (1894); *Kalaris v. Donovan*, 697 F.2d 376, 388 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983).

- The power of the federal courts to dismiss indictments is extremely limited, *see, e.g., United States v. Williams*, 504 U.S. 36, 45-55 (1992), and federal courts cannot review how a District of Columbia Superior Court rules on motions to quash or modifies subpoenas, grants immunity, or performs any of the other judicial functions associated with supervising a grand jury.

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depart from the requirements of Article III.

Schor, 478 U.S. at 851 (citations omitted).

- Far from being a recent development, judicial supervision of the grand jury's investigative function is "traceable to the English common law, and was accepted by at least 1612." S. Brenner & G. Lockhart, *Federal Grand Jury: A Guide to the Law and Practice* § 11.1, at 338 (1996).

- This Court has specifically held that Congress' plenary power over the District of Columbia does not "destroy the operative effect of the judicial clause within the District." *O'Donoghue v. United States*, 289 U.S. 516, 546 (1933).

Petition for Rehearing at 6-10.

Petitioners also observed that this Court has never permitted a traditional judicial function to be entirely stripped from the federal judiciary but has instead required federal courts to retain the power to review the exercise of that function. Petition for Rehearing at 7-8. Petitioner pointed out as well that the Government had not identified any significant problem in maintaining the jury pool in the District, that the panel failed to point to any evidence of such a problem, and that justifying an intrusion upon the powers of the Judiciary by reference to mere efficiency was inimical to settled separation-of-powers principles. *Id.* at 8-9. On February 10, 1998, the court below denied rehearing without opinion. App. 26a.

REASONS FOR GRANTING THE WRIT

This case presents a question of fundamental importance concerning Article III and the separation of powers: whether Congress may transfer responsibility for a portion of a federal case to a non-Article III judge whose rulings are not reviewable by an Article III court, thereby entirely stripping the federal courts of a traditional judicial function. By answering this question in the affirmative, the decision below permitted an unprecedented intrusion upon the power of the federal judiciary. Not surprisingly, it also contradicted the plain language of Article III, violated well-settled principles of separation of powers, and created a conflict among the federal courts of appeals. This decision warrants review by this Court.

I. THE DECISION BELOW CONFLICTS WITH THE PLAIN LANGUAGE OF ARTICLE III AND WITH THE DECISIONS OF THIS COURT.

Article III provides that the "judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain" and that the judges of these courts "shall hold their Offices during good Behavior" and receive compensation "which shall not be diminished." U.S. Const., art. III, § 1. The meaning of this provision is "clear and definite: The judicial power of the United States must be executed by courts having the attributes prescribed in Art. III." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality op.). D.C. Code § 1916 cannot be reconciled with this "inexorable command." *Id.* As applied here, Section 1916 assigns judicial functions traditionally performed by Article III judges in supervising grand juries issuing federal indictments to the judges of the District of Columbia Superior Court. The judges of the Superior Court do not, however, hold their offices during good behavior, nor is their compensation protected against diminution. They are instead appointed for limited terms, they are subject to removal for any conduct a commission appointed by the President deems "prejudicial to the administration of justice," and their salaries are subject to reduction by Congress. *See Palmore v. United States*, 411 U.S. 389, 411-12 (1973) (Douglas, J., dissenting); D.C. Code §§ 11-1502, 11-1521-30. As a consequence, Section 1916 violates the plain language of Article III.

It is, of course, true that this Court has permitted non-Article III judges to perform some traditional judicial functions in federal cases. This Court has, for example, permitted magistrate judges to hear suppression motions and to conduct voir dire with the consent of the parties. *See Peretz v. United States*, 501 U.S. 923, 936-40 (1991); *United States v. Raddatz*, 447 U.S. 667, 681-84 (1980). *But see Gomez v. United States*, 490 U.S. 858, 872-75 & n.29 (1989) (expressing doubts about the constitutionality of a magistrate conducting voir dire without the consent of the parties). Administrative agencies have also been permitted to hear common-law claims under limited circumstances. *See, e.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847-57 (1986); *Crowell v.*

Benson, 285 U.S. 22, 50-54 (1932). This Court has never, however, permitted the federal courts to be entirely stripped of a judicial function in a case falling within the traditional purview of the courts. To the contrary, where non-Article III judges have been permitted to exercise judicial functions in federal cases, this Court has required that the federal courts retain ultimate control over these functions through effective judicial review of their exercise. *See, e.g.*, *Peretz*, 501 U.S. at 938 (noting that a "district judge — insulated by life tenure and irreducible salary — is waiting in the wings, fully able to correct errors") (quotation omitted).[2] Because Section 1916 does not provide for any review of the traditional judicial functions it transfers to non-Article III judges, the decision below upholding the constitutionality of the statute cannot be reconciled with the decisions of this Court.

The decision below also conflicts with the separation-of-powers principles underlying Article III. As this Court has repeatedly noted, Article III's tenure and salary guarantees not only ensure that litigants will have fair and impartial judges; they also "protect the role of the independent judiciary within the constitutional scheme of tripartite government." *Schor*, 478 U.S. at 848 (quotation omitted). The Founding Fathers viewed "[p]eriodical appointments" of judges as "fatal to their necessary independence" because the need to seek reappointment naturally engenders the "danger of an improper complaisance to," and "unwillingness to hazard the displeasure of," the appointing authority. *The Federalist* No. 78, at 471 (A. Hamilton) (Clinton Rossiter ed., 1961). Likewise, the Founding Fathers took the position that "[n]ext to permanency in office, nothing can contribute to the independence of the judges than a fixed provision for their support." *The Federalist* No. 79, at 472 (A. Hamilton). The Constitution therefore provides federal judges with guarantees of lifetime tenure "during good Behavior" and of "a Compensation,

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[2] *See also Schor*, 478 U.S. at 853 (noting that legal rulings are reviewable *de novo* and factual findings under the weight-of-the-evidence standard); *Raddatz*, 447 U.S. at 683 (noting that "the ultimate decision is made by the district court"); *Crowell*, 285 U.S. at 50-54 (noting that legal rulings are reviewable *de novo* and factual findings under the weight-of-the-evidence standard).

which shall not be diminished during their Continuance in Office." U.S. Const, art. III, § 1. As these protections would be meaningless if the requirement that the judicial power "shall be vested" in federal courts with judges enjoying such protections could be ignored and portions of federal cases transferred to judges not enjoying these protections, this Court has recognized that Article III bars Congress from simply transferring jurisdiction over traditional judicial functions to non-Article III tribunals. *See Schor*, 478 U.S. at 850. Because the decision below permits just such a transfer, it cannot be reconciled with the principles recognized by this Court.

Moreover, the decision below ignores the most fundamental principle of separation of powers, which is to "safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). Although prosecutors often exercise enormous influence over grand juries, *see* M. Frankel & G. Naftalis, *The Grand Jury: An Institution on Trial* 21-23, 99-102 (1977), a grand jury is "powerless to perform its investigative function without the court's aid." *Brown v. United States*, 359 U.S. 41, 49 (1959), *overruled on other grounds by Harris v. United States*, 382 U.S. 162 (1965); *see also id.* ("It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing he refuses to do so."). As a consequence, when federal judges supervising grand juries consider whether to quash subpoenas, uphold claims of privilege, enforce immunity agreements, or punish prosecutors for leaking grand jury information — as Chief Judge Norma Holloway Johnson of the United States District Court for the District of Columbia has reportedly been asked to do in the last several months[3] — they provide an important check on prosecutors. By permitting judicial supervision of the grand jury process to be transferred at the discretion of the U.S. Attorney from Article III

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[3] *See, e.g.*, J. Broder, *Clinton Asks for Sanctions against Starr*, The New York Times, May 7, 1998, at A21; S. Schmidt & A. Goldstein, *Judge Says Lewinsky Has No Immunity Deal*, The Washington Post, April 30, 1998, at A1; J. Mintz & P. Baker, *A Test of Confidentiality; Lawyer Told to Testify, Produce Papers*, The Washington Post, April 3, 1998, at A34.

judges enjoying tenure and salary guarantees to non-Article III judges who do not, Section 1916 undermines this check and impermissibly aggrandizes the power of the Executive Branch at the expense of the Judiciary.

Ignoring the plain language of Article III and the principles underlying the separation-of-powers doctrine, the panel relied almost exclusively upon the four-part balancing test formulated in *Commodity Futures Trading Commission v. Schor*. In applying these factors, however, the decision below repeatedly contradicted the decisions of this Court:

1. The first factor in the *Schor* balancing test is the "extent to which the 'essential attributes of judicial power' are reserved to Article III courts." *Schor*, 478 U.S. at 851 (citation omitted). The decision below found that Section 1916 does not implicate any essential attributes of judicial power because federal judges play only a limited role in the grand jury process. App. 10-11a. In their supervisory role, however, federal judges perform a number of important and quintessentially judicial functions, including quashing or enforcing subpoenas, granting or denying immunity, compelling testimony or punishing the failure to testify through the exercise of their contempt power, and enforcing the secrecy requirements of grand jury proceedings. *See, e.g.*, Brenner & Lockhart, *Federal Grand Jury* §11.11, 13.15, 14.15, 15.3.

As recent developments in the independent counsel's investigation of the President have dramatically demonstrated, the exercise of these functions may involve issues of national importance. Just this March, this Court granted certiorari in a case arising out of a grand jury subpoena issued in the District of Columbia. *See Swidler & Berlin v. United States*, 118 S. Ct. 1358 (1998). According to newspaper reports, Chief Judge Johnson recently denied a claim of executive privilege by the President asserted in response to a grand jury subpoena, *see* P. Baker & S. Schmidt, *President is Denied Executive Privilege*, The Washington Post, May 6, 1998, at A1, and she is reported to be considering the novel question whether Secret Service agents can claim privilege for conversations overheard and events seen while protecting the President. *See* R. Suro, *Justice Department to*

Fight Starr on Forcing Secret Service to Talk, The Washington Post, April 15, 1998, at A1. And, of course, it was Judge John Sirica's decision ordering production of the Watergate tapes to a grand jury that precipitated the resignation of President Nixon. *See Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973) (upholding decision).

Furthermore, this Court has long recognized that the functions federal judges perform in supervising grand juries implicate essential attributes of judicial power. More than a century ago, this Court recognized that the power to compel production of evidence is exclusively judicial in nature. *See ICC v. Brimson*, 154 U.S. 447, 485 (1894) ("The inquiry whether a witness. . . is bound to answer a particular question propounded to him, or produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination."). This Court likewise recognized that the "[t]he power to impose fine or imprisonment to compel performance of a legal duty imposed by the United States, can only be exerted, under the law of the land, by a competent judicial tribunal." *Id.* Indeed, prior to issuing the decision below, the D.C. Circuit recognized that "the power of subpoena" and, more broadly, the power to enforce orders are "essential attributes of the judicial power." *Kalaris v. Donovan*, 697 F.2d 376, 388 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983).

2. The second factor in the *Schor* balancing test is the "extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts." *Schor*, 478 U.S. at 851. The panel found that this factor weighs in favor of the constitutionality of Section 1916 because the Article III judges of the federal district court "retain [the] authority to dismiss an indictment." App. 14a. A federal district court judge cannot, however, review the decision of a Superior Court judge refusing to quash a subpoena before the grand jury or compelling a witness to testify in spite of a claim of privilege. Such decisions are reviewed by the District of Columbia Court of Appeals, not the federal courts. *See, e.g., In re Kelley*, 433 A.2d 704 (D.C. 1981) (en banc); *United States v. Moultrie*, 340 A.2d 828 (D.C. 1975). Moreover, to the extent that the decision below suggests that a federal court may dismiss an indictment because of a ruling on a motion to quash or a request for immunity, it conflicts with

this Court's decision in *United States v. Williams*, 504 U.S. 36, 45-55 (1992), which held that judicial authority to dismiss indictments based upon conduct before a grand jury is severely restricted.

3. The third *Schor* factor is the "origins and importance of the right to be adjudicated." *Schor*, 478 U.S. at 851. The decision below found that this factor weighed in favor of the constitutionality of Section 1916 because "the grand jury's reliance on a judge for subpoenas, immunity orders and the like is a relatively recent development in the history of the institution." App. 15a. This Court has, however, recognized that "[a]t the foundation of our Federal government, the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States." *Blair v. United States*, 250 U.S. 273, 280 (1919); *see generally* Brenner & Lockhart, *Federal Grand Jury* § 11.1, at 338 (noting that the grand jury's use of judicially-issued subpoenas is "traceable to the English common law, and was accepted by at least 1612").

4. In applying the final factor of the *Schor* balancing test — the "concerns that drove Congress to depart from the requirements of Article III" (*Schor*, 478 U.S. at 851) — the court below asserted that this factor weighs in favor of Section 1916 because that provision "promotes efficiency resulting from the identity (both in composition and function) of the District of Columbia Superior Court and the federal grand jury." App. 15a. In addition to being unsupported by any empirical evidence or even endorsed below by the Government, this assertion directly contradicts the decisions of this Court. This Court has repeatedly stated that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 63 (1989) (quotation omitted); *accord Bowsher v. Synar*, 478 U.S. 714, 736 (1986); *INS v. Chadha*, 462 U.S. 919, 944 (1983). Moreover, just three years ago, this Court stressed that the doctrine of separation of powers is a "structural safeguard," a "prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211,

239 (1995). Plainly, the suggestion in the decision below that this safeguard can be surmounted by concern for the efficient use of a jury pool contradicts this Court's teachings.

5. Finally, the assertion that Congress' plenary power under Art. I, § 8, cl. 17 over the District of Columbia "fortifies" the holding below (App. 17a) conflicts with this Court's decision in *O'Donoghue v. United States*, 289 U.S. 516 (1933). In that case, this Court rejected the suggestion that "the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union" and held that there was "no reason for holding that the plenary power given by the District clause of the Constitution may be used to destroy the operative effect of the judicial clause within the District . . . ." *Id.* at 540, 546.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE FIFTH AND ELEVENTH CIRCUITS.

In addition to contradicting the plain language of Article III, well-settled principles of separation of powers, and numerous decisions of this Court, the decision below also squarely conflicts with decisions of the Fifth and Eleventh Circuits.

In *Georg v. Parungao*, 930 F.2d 1563 (11th Cir. 1991), a trustee appointed by a German court asked a federal bankruptcy judge to recognize and enforce the orders of the German court. When the bankruptcy judge entered an order abstaining from exercising jurisdiction, the German trustee appealed to the district court. The district court, however, dismissed the appeal on the ground that the bankruptcy judge's order was unreviewable under Section 305 of the Bankruptcy Code, which at that time stated that an order "dismissing a case or suspending all proceedings in a case . . . is not reviewable by appeal or otherwise." 11 U.S.C. § 305(c) (West 1979).[4]

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[4] In 1990, Congress amended Section 305 to make orders under that section "not reviewable by appeal or otherwise by the court of appeals . . . or by the United States Supreme Court." Federal Courts Study Committee Implementation Act of 1990, Pub. L. 101-650, § 309, 104 Stat. 5113 (1990).

The Eleventh Circuit reversed. Relying upon a prior decision, the Eleventh Circuit held that "an Article I bankruptcy court may not issue an unreviewable section 305 order to dismiss or, alternatively to abstain from jurisdiction over a bankruptcy case." *Georg*, 930 F.2d at 1565 (citing *Parklane Hosiery Co. v. Parklane/Atlanta Venture*, 927 F.2d 532 (11th Cir. 1991)) (footnote omitted). As the Eleventh Circuit explained in that prior decision, a bankruptcy court cannot issue an order that "would terminate the district courts' jurisdiction over the instant case without review by an Article III court" because "[s]uch an order would be an impermissible exercise of the judicial power of the United States by a non-Article III court . . . ." *Parklane*, 927 F.2d at 538 (citations omitted).

More recently, the Fifth Circuit reached a similar conclusion. In *Jones v. Johnson*, 134 F.3d 309 (5th Cir. 1998), an inmate seeking a writ of habeas corpus moved in federal district court for a certificate of probable cause to permit him to appeal. *See* 134 F.2d at 309-10 (noting that the rules in effect at the time required a certificate of probable cause for an appeal from the denial of habeas request). The district court referred the motion to a magistrate judge for disposition, and the magistrate judge issued an order denying the motion. *See id.* at 309. When the inmate appealed and requested that the Fifth Circuit issue a certificate of probable cause, the Fifth Circuit found that the "pivotal question" before it was "whether a given duty assigned to a magistrate judge is subject to meaningful review by the district court judge" because "Article III judges cannot delegate to magistrate judges final authority over some important issue in a case." *Jones*, 134 F.3d at 311 (footnote and quotation omitted); *see also id.* at 311-12 (noting that Article III requires district court judges to "retain[] ultimate control over the [] proceedings", (quotation omitted). Finding "insufficient provision for review," the Fifth Circuit held the magistrate's order ineffective and ruled that it had no jurisdiction over the appeal. *Id.* at 311-12.

The opinion below cannot be reconciled with these decisions. Both the Fifth and the Eleventh Circuits held that judicial functions may not be assigned to non-Article III judges unless the performance of those functions are reviewable by an Article III court. The decision below, however, permits Congress to transfer control over subpoenas,

immunity, contempt, and other functions courts perform in supervising grand juries to a non-Article III judge without providing for any review by an Article III court. Indeed, the intrusion upon the power of the federal judiciary in this case is even greater than in *Georg* and *Jones* because, unlike the statutes considered in those cases, Section 1916 strips federal judges of all control over the functions transferred. Federal magistrate judges and bankruptcy judges are appointed by Article III judges, and Article III judges determine which matters to refer to these adjuncts. *See* 28 U.S.C. §§ 152, 157, 631, 636; *see generally Northern Pipeline*, 458 U.S. at 76-87 (discussing adjuncts). Article III judges exercise no such control over Superior Court judges: Superior Court judges are appointed by the President, *see* D.C. Code § 11-1501, and the assignment of judicial functions under Section 1916 is effectively controlled by the U.S. Attorney for the District of Columbia, who determines which matters to bring before Superior Court grand juries. As a consequence, the decision below squarely conflicts with the decisions of the Fifth and Eleventh Circuits.

III. THIS CASE RAISES ISSUES OF FUNDAMENTAL IMPORTANCE.

Although recent events have amply demonstrated the importance of the role that federal judges play in supervising grand juries, *see supra* pp. 9-10, the significance of the decision below extends far beyond the grand jury arena. The decision below appears to be the first to ever sanction the complete transfer of a traditional judicial function from the federal courts to a non-Article III court: in previous cases, to comply with Article III's mandate that the judicial power "shall be vested in courts" whose judges enjoy tenure and salary guarantees, U.S. Const., art. III, § 1, this Court has required that Article III judges at least review the performance of traditional judicial functions. *See supra* pp. 6-7. The decision below also appears to be the first case in which a federal court has found an intrusion upon the powers of the Judiciary justified by its efficiency alone. Thus, the opinion below simultaneously broadens the range of permissible intrusions upon the power of the federal judiciary and lowers the level of justification required for such intrusions. As a disproportionate number of important separation-of-powers cases are brought in federal court in

the District of Columbia,[5] this decision may have far-reaching effects on separation-of-powers jurisprudence and, thereby, the structure of the government. For this reason alone, the decision below should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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[5] In the last twelve years alone, eight separation-of-powers cases brought in federal court in the District of Columbia have made it to this Court. *See, e.g., Clinton v. City of New York*, 118 S.Ct. 1123 (1998); *Raines v. Byrd*, 117 S. Ct. 2312 (1997); *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88 (1994); *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *Schor*, 478 U.S. at 838; *Bowsher*, 478 U.S. at 719. Moreover, Congress often directs that cases raising separation-of-powers questions be brought in the District of Columbia. *See, e.g.*, 2 U.S.C. § 692(b) (Line-Item Veto Act); *id.* § 922(a)(5) (Balanced Budget and Emergency Deficit Control Act).

APPENDIX

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.

UNITED STATES OF AMERICA, Appellee,
v.
WILLIAM H. SEALS, a/k/a Puddin, a/k/a William Brooks, Appellant.

UNITED STATES OF AMERICA, Appellee,
v.
GARY W. SWEATT, Appellant.

Nos. 96-3108, 96-3109.

Decided Dec. 5, 1997.

Before: WILLIAMS, GINSBURG and HENDERSON, Circuit Judges.

KAREN LeCRAFT HENDERSON, Circuit Judge:

The appellants, William Seals and Gary Sweatt, appeal their convictions on federal conspiracy, kidnapping and extortion charges. They contend that the Speedy Trial Act, 18 U.S.C. §§ 3161 *et seq.*, and Article III of the United States Constitution require dismissal of the indictment underlying their convictions. In addition, Sweatt argues that there was insufficient evidence to convict him of kidnapping and that the district court improperly sentenced him as a "career offender" under section 4B1.1 of the United States Sentencing Guidelines (Guidelines). We affirm the appellants' convictions but vacate Sweatt's sentence and remand to the district court to resentence him not as a career offender.

I. BACKGROUND

On August 2, 1995 Seals and Sweatt were arrested and a criminal complaint was filed against them in D.C. Superior Court, charging them with armed kidnapping in violation of D.C. Code Ann. §§ 22-2101, 22-3202 (1981 & Supp. 1995). They were not, however, immediately indicted on these charges. After their arrest by Federal Bureau of Investigation (FBI) agents, the FBI and the D.C. Metropolitan Police Department continued their joint investigation into the kidnapping. The investigation resulted in the arrest of two other

suspects and additional evidence which persuaded the United States Attorney to alter his tentative decision to lodge D.C. charges against them and to instead indict them on federal charges. As a result, on October 31, 1995 a D.C. Superior Court grand jury returned an indictment in the United States District Court for the District of Columbia.

Before trial Seals and Sweatt moved to dismiss the indictment on Speedy Trial Act and constitutional (Article III) grounds. The lower court denied the motion, finding that the United States Attorney had not sent "the case back to D.C. Superior Court . . . for the purpose of gaining additional time for federal prosecution." Pre-Trial Mot. Tr. 225. It further held that the Congress, with plenary authority over the District of Columbia, validly authorized the D.C. Superior Court, an Article I tribunal, to supervise a grand jury that can indict for both D.C. and federal offenses. *Id.* at 201.

At the appellants' trial the Government presented evidence showing that Sweatt had assisted in detaining the kidnap victim and in retrieving the ransom money. There was no evidence, however, from which the jury could infer that Sweatt had either been present at or assisted in the abduction and transport of the victim across state lines. At the close of the Government's case, Sweatt moved for acquittal on the ground that he could not be found guilty of kidnapping unless he was shown to have participated in the abduction or transport of the victim across state lines. His motion was denied.

The district court charged the jury on the kidnapping and extortion counts of the indictment under three theories: (1) liability as a principal under 18 U.S.C. § 1201(a) (kidnapping) and 18 U.S.C. § 1951 (extortion); (2) liability as an aider and abettor under 18 U.S.C. § 2; and (3) liability as a Pinkerton co-conspirator (*Pinkerton v. United States*, 328 U.S. 640, 647-48, 66 S. Ct. 1180, 1184-85, 90 L. Ed. 1489 (1946)). The jury returned a general verdict, finding both Seals and Sweatt guilty of conspiracy, kidnapping and extortion. Seals and Sweatt were subsequently sentenced to identical, concurrent terms of imprisonment. They each received 60 months for conspiracy, 240 months for extortion and life imprisonment for kidnapping.

At sentencing, Sweatt argued that he should be sentenced under the November 1994 version of Chapter 4, Part B, of the Guidelines and that, according to the 1994 version, as modified by *United States v. Price*, 990 F.2d 1367 (D.C. Cir. 1993), he did not have the requisite number of prior convictions to qualify as a career offender. The district court disagreed, concluding that the November 1994 and November 1995 versions of the Guidelines were substantially identical, the only difference being that the 1995 version of section 4B1.1 contained amended Background Commentary. Thus, the lower court ruled that Sweatt's prior convictions of robbery and attempted distribution of heroin required that he be sentenced as a career offender under both the 1994 and 1995 versions of section 4B1.1.[1]

II. DISCUSSION

Despite the parties' contentions to the contrary, all of the appellants' claims involve the trial court's legal conclusions or its application of legal standards to the facts. Accordingly, we review their claims *de novo*. *See United States v. Abdul-Saboor*, 85 F.3d 664, 667 (D.C. Cir. 1996).

A. TIMELINESS OF INDICTMENT

The Speedy Trial Act (STA) provides that "[a]ny information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges." 18 U.S.C. § 3161(b). The appellants contend that the clock began on the date of their August 1995 arrests and expired thirty days later in September 1995. They therefore argue that their October 1995

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[1] If Sweatt had not been sentenced as a career offender under section 4B1.1, the maximum term of imprisonment he could have received for the kidnapping conviction would have been 235 months, reducing his term of imprisonment from life to 240 months – the longest of the concurrent sentences imposed.

indictment should be dismissed as untimely pursuant to 18 U.S.C. § 3162(a)(1). [2] We disagree.

In *United States v. Mills*, 964 F.2d 1186 (D.C. Cir.) (en banc), *cert. denied*, 506 U.S. 977, 113 S. Ct. 471, 121 L. Ed.2d 378 (1992), we determined that "[u]nder the most natural reading" of section 3161(b), "an arrest starts the clock only if it is 'in connection with' federal charges" and thus, "[i]f . . . the arrest [is] accompanied by a complaint charging violations of the D.C. (not U.S.) Code, it [is] not 'in connection with' federal charges." 964 F.2d at 1189 (emphasis original). Further, we concluded that the remedial provision for an untimely indictment, 18 U.S.C. § 3162(a)(1), "also suggests that the [STA] is triggered only by arrests that are accompanied by the filing of a federal complaint against the defendant." *Id.* (emphasis original); *see also id.* at 1193 (Congress adopted "language in 3161(b) that addresses solely federal complaints and their attendant arrests") (emphasis added). We therefore held that because the Mills defendants were initially charged with violations of the D.C. Code, the section 3161(b) clock did not start on their arrest dates and thus the federal indictments (returned, in one instance, one year after arrest) were not untimely. 964 F.2d at 1188-93.

Our *Mills* decision disposes of the appellants' STA claims. Their August arrests, accompanied by the filing of D.C. charges only, cannot be deemed arrests "in connection with" federal charges and thus cannot

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[2] This subsection provides:

> If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

18 U.S.C. § 3162(a)(1).

start the STA clock. Nonetheless, Seals and Sweatt invite us to fashion an exception to *Mills* for the "unusual" circumstances of this case which (in their view) consist of (1) the FBI's involvement in the arrests and its continuing role in the post-arrest investigation of the kidnapping, (2) the United States Attorney's "contemplation" of federal charges when they were arrested and charged with violations of the D.C. Code, (3) the alleged tentativeness of the U.S. Attorney's initial decision to bring D.C. rather than federal charges and (4) the identity of the prosecuting personnel. We decline their invitation.

First, the fact that the FBI was actively involved in their August arrests does not make them arrests "in connection with" federal charges. *See United States v. Gerald*, 5 F.3d 563, 566 (D.C. Cir. 1993) (where arrest was followed by indictment for D.C. Code violations, fact that defendant arrested by federal law enforcement officer held not to trigger STA clock), *cert. denied*, 511 U.S. 1144, 114 S. Ct. 2168, 128 L. Ed.2d 890 (1994); *cf. Mills*, 964 F.2d at 1192 (recognizing "the now well-established principle that a state arrest does not start the clock no matter how extensive the federal involvement in the original arrest") (emphasis added). Nor does the fact that the FBI actively participated in the post-arrest investigation make Seals's and Sweatt's August apprehension an arrest "in connection with" federal charges. *See United States v. Iaquinta*, 674 F.2d 260, 262-69 (4th Cir. 1982) (federal investigation undertaken after defendant's arrest and indictment on state charges and leading to discovery of additional evidence prompting federal indictment did not mean STA clock began on date of original arrest); *cf. Gerald*, 5 F.3d at 565 (STA clock not triggered by original arrest on D.C. charges even though prosecutor subsequently decided to seek federal indictment as result of postarrest review of defendant's criminal record and seriousness of D.C. charges); *United States v. Candelaria*, 704 F.2d 1129, 1130 (9th Cir. 1983) (arrest by military police did not trigger STA clock despite subsequent FBI involvement).

Second, whether the prosecutor contemplated the filing of, or only tentatively decided not to bring, federal charges at the time of the appellants' arrests is irrelevant to deciding when the clock starts. *Cf. Iaquinta*, 674 F.2d at 269 (suggesting inappropriateness of probe into federal prosecutor's motives because prosecutor not required to file

federal charges as soon as he has enough evidence to prosecute). At the very least, such an inquiry is proscribed by the long line of cases holding that a federal prosecution based on the same conduct as a failed state prosecution – and which is pursued in order to salvage the prosecution – is not prohibited by the STA because the state arrest does not start the STA clock. *See Mills*, 964 F.2d at 1189-90 (citing Second, Third, Fourth, Fifth, Seventh, Eighth and Ninth Circuit decisions for "the undisputed rule that a state arrest does not trigger the Speedy Trial Act's clock, even if the arrest is for conduct that is the basis of a subsequent indictment for a federal offense").

Nor do the decisions upon which the appellants purport to rely – e.g., *United States v. Benitez*, 34 F.3d 1489, 1494 (9th Cir. 1994), *cert. denied*, 513 U.S. 1197, 115 S. Ct. 1268, 131 L. Ed.2d 146 (1995); *United States v. Cepeda-Luna*, 989 F.2d 353, 357 (9th Cir. 1993) – require a different result. The cases do not authorize a wide-ranging judicial inquiry into the prosecutor's motives or the finality of his decisionmaking processes. Rather, they merely carve out a narrow exception to prevent prosecutorial manipulation of STA deadlines. The "ruse" exception is inapposite here because the court below expressly found that "there was no effort to manipulate the system to gain more time" (Pre-Trial Mot. Tr. 225) and the appellants do not contest the finding.

Third, as the Government properly notes, the fact that the same personnel were responsible for prosecuting Seals and Sweatt in the D.C. Superior Court and United States District Court does not transform their arrests on D.C. charges into arrests "in connection with" federal charges. *See Mills*, 964 F.2d at 1192-93 (rejecting claim that identity of non-federal and federal prosecutorial personnel triggers STA clock on date of arrest accompanied by filing of non-federal charges).

Fourth, we reject the appellants' other arguments – namely, that the STA's language, structure and purpose suggest that an arrest on D.C. charges merely establishes a "presumption" that the arrest does not trigger the STA clock and that the "presumption" is rebutted by the unique circumstances of this case. To the extent that the arguments have any merit, they are plainly foreclosed by *Mills*. *See* 964 F.2d at

1193 (section 3161(b) "addresses *solely federal complaints* and their attendant arrests") (emphasis added). [3]

B. CONSTITUTIONALITY OF INDICTMENT

D.C. Code Ann. § 11-1916(a) (1981 & Supp.1995) (section 1916(a)) provides that "[a] grand jury serving in the District of Columbia may take cognizance of all matters brought before it regardless of whether the indictment is returnable in the Federal or District of Columbia Courts." The appellants argue that the provision is unconstitutional because it vests the judicial power of the United States outside Article III and it does so by improperly empowering the executive branch. [4]

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[3] Thus, contrary to the appellants' argument, we decline to read section 3161(b) without reference to section 3162(a)(1) (see supra note 2). *See Mills*, 964 F.2d at 1189 ("There appears to be undisputed support among the circuits for this reading of the interplay between §§ 3161(b) and 3162(a)(1)."). Similarly, we reject their assertion that the STA clock should be understood to start on the same date the Sixth Amendment clock starts. *See id.* at 1193 ("[T]he [STA] is not intended to track the Sixth Amendment. Within the set of cases covered, it establishes bright-line rules assuring minimum speed, while at the same time preserving defendants' Sixth Amendment claims in full.").

[4] The appellants also claim that section 1916(a) deprives them of the constitutional safeguards associated with Article III supervision of federally-indicting grand juries. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848, 106 S. Ct. 3245, 3255, 92 L. Ed.2d 675 (1986) ("Article III, § 1, serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government, . . . and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government . . . . Although our cases have provided us with little occasion to discuss the nature or significance of the latter safeguard, our prior discussions of Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States intimated that this guarantee serves to protect primarily personal, rather than structural, interests.") (internal quotation marks and citations omitted); *Peretz v. United States*, 501 U.S. 923, 929, 111 S. Ct. 2661, 2665-66, 115 L. Ed.2d 808

(1991) (noting that *Gomez v. United States*, 490 U.S. 858, 864, 109 S. Ct. 2237, 2241-42, 104 L. Ed.2d 923 (1989), had construed statute to avoid "substantial question whether a defendant has a constitutional right to demand that an Article III judge preside at every critical stage of a felony trial"); but *cf. Palmore v. United States*, 411 U.S. 389, 400, 93 S. Ct. 1670, 1678, 36 L. Ed.2d 342 (1973) (rejecting view "that criminal offenses under the laws passed by Congress may not be prosecuted except in courts established pursuant to Art. III [because] [i]n our view, . . . there is no support for this view in either constitutional text or in constitutional history and practice"); *Swain v. Pressley*, 430 U.S. 372, 382, 97 S. Ct. 1224, 1230, 51 L. Ed.2d 411 (1977) ("[T]he Constitution does not require that all persons charged with federal crimes be tried in Article III courts.").

To the extent this claim is distinguishable from the appellants' other claims, it implicates personal, not structural, constitutional rights – insofar as such rights might exist in the grand jury context (about which we express no opinion here). Assuming the right exists and assuming it was violated as alleged, the appellants would not be entitled to a dismissal of the indictment unless the violation prejudiced them, which they do not contend and which the trial judge explicitly rejected. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 254, 108 S. Ct. 2369, 2373, 101 L. Ed.2d 228 (1988) ("We hold that as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants."). While *Bank of Nova Scotia* involved violations of Fed. R. Crim. P. 6(d) & (e), the decision plainly suggests that the analysis for constitutional errors is no different from that used to assess other types of errors. *See id.* at 256, 108 S. Ct. at 2374 ("It would be inappropriate to devise a rule permitting federal courts to deal more sternly with nonconstitutional errors than with constitutional errors."). Moreover, if the petit jury ultimately returns a guilty verdict, any error committed at the grand jury stage is (with exceptions not applicable here) nonprejudicial. *See United States v. Mechanik*, 475 U.S. 66, 70, 106 S. Ct. 938, 941-42, 89 L. Ed.2d 50 (1986) ("But the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.") (note omitted).

(1) *Judicial Supervision of Grand Jury as "Judicial Power of United States"*

The only reference to the grand jury in the Constitution is found in the first clause of the Fifth Amendment.[5] The grand jury "has not been textually assigned, therefore, to any of the branches described in the first three Articles." *United States v. Williams*, 504 U.S. 36, 47, 112 S. Ct. 1735, 1742, 118 L. Ed.2d 352 (1992).[6] Accordingly, it has been described as "an institution separate from the courts, over whose functioning the courts do not preside." *Id.*; *see also id.* at 48, 112 S. Ct. at 1742 ("[I]n its day-to-day functioning, the grand jury generally operates without the interference of a presiding judge."); but *cf. Blair v. United States*, 250 U.S. 273, 278, 39 S. Ct. 468, 470, 63 L. Ed. 979 (1919) ("At the foundation of our federal government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States."); *Levine v. United States*, 362 U.S. 610, 617, 80 S. Ct. 1038, 1043, 4 L. Ed.2d 989 (1960) ("The grand jury is an arm of the court and its in camera proceedings constitute a judicial inquiry.") (internal quotation omitted).

The independence of the grand jury reflects the protective role it plays in our system of criminal justice: "Historically, this body has been regarded as the primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused,

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[5] The Grand Jury Clause of the Fifth Amendment recites:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . .

U.S. Const. Am. V, cl. 1.

[6] The grand jury's lineage is outlined in *Hurtado v. California*, 110 U.S. 516, 4 S. Ct. 111 (1884), and dates back to at least 1164. *Id.* at 529, 4 S. Ct. at 117-18.

whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Wood v. Georgia*, 370 U.S. 375, 390, 82 S. Ct. 1364, 1373, 8 L. Ed.2d 569 (1962); *accord Williams*, 504 U.S. at 47, 112 S. Ct. at 1742.[7]

The grand jury does depend on the judiciary in its role as an investigative body: "A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses." *Brown v. United States*, 359 U.S. 41, 49, 79 S. Ct. 539, 546, 3 L. Ed.2d 609 (1959), *overruled on other ground by Harris v. United States*, 382 U.S. 162, 86 S. Ct. 352, 15 L. Ed.2d 240 (1965); *accord United States v. Calandra*, 414 U.S. 338, 346 n.4, 94 S. Ct. 613, 619, n.4, 38 L. Ed.2d 561 (1974) ("[T]he grand jury must rely on the court to compel production of books, papers, documents, and the testimony of witnesses, and the court may quash or modify a subpoena on motion if compliance would be unreasonable or oppressive.") (internal quotation omitted). But even this dependence is limited as the grand jury must "remain 'free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.'" *Williams*, 504 U.S. at 48-49, 112 S. Ct. at 1743 (quoting *United States v. Dionisio*, 410 U.S. 1, 17-18, 93 S. Ct. 764, 773, 35 L. Ed.2d 67 (1973)) (emphasis added).

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[7] Under the Fifth Amendment, an indictment is not required to initiate prosecution of a state "capital[ ] or otherwise infamous crime." *See Hurtado*, 110 U.S. at 538, 4 S. Ct. at 122. Although the District is treated like a state in many respects – *see, e.g., Palmore*, 411 U.S. at 397, 93 S. Ct. at 1676 (1973) (in District of Columbia "Congress may also exercise the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes") – the Supreme Court has held that the prosecution of a D.C. Code offense carrying the possibility of "infamous punishment" may not be commenced other than by grand jury indictment or presentment as required by the Fifth Amendment. *See United States v. Moreland*, 258 U.S. 433, 42 S. Ct. 368, 66 L. Ed. 700 (1922).

Moreover, an Article III judge's role in the grand jury's investigative process is often more attenuated as the responsibility for issuing subpoenas and for accepting returned indictments is vested in United States magistrate judges who are not Article III judges. *See* Fed. R. Crim. P. 17(a) (subpoenas "shall be issued by United States Magistrate Judge[s]"); Fed. R. Crim. P. 6(e)(4) & 6(f) (indictment is to be returned to magistrate judge). Indeed, the significance attached to Article III supervision of a grand jury is so minor that the Supreme Court has held that the judge's absence from the federal judicial district in which the grand jury is sitting neither implicates constitutional rights of the defendant nor otherwise constitutes cognizable error. *See Badders v. United States*, 240 U.S. 391, 394, 36 S. Ct. 367, 368, 60 L. Ed. 706 (1916). Therefore, "[g]iven the grand jury's operational separateness from its constituting court, it should come as no surprise that [the Supreme Court] ha[s] been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure." *Williams*, 504 U.S. at 49-50, 112 S. Ct. at 1743.

Accordingly, to the extent that the supervision of a federally competent grand jury implicates the Article III "judicial power of the United States," the power is a circumscribed one and is far removed from "the essential attributes of the judicial power" with which Article III is principally concerned. *Crowell v. Benson*, 285 U.S. 22, 51, 52 S. Ct. 285, 292, 76 L. Ed. 598 (1932). Moreover, section 1916(a) is applicable only to the "unique federal enclave," *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 75, 102 S. Ct. 2858, 2874, 73 L. Ed.2d 598 (1982) (plurality op.) [hereinafter Northern Pipeline], that is the District of Columbia.

(2) *Expanded Executive Branch Involvement with Grand Jury as Encroachment on Judicial Branch*

Seals and Sweatt contend that section 1916(a), by substituting Article I for Article III supervision of a federally-competent grand jury, unconstitutionally encroaches on the judicial branch. Their argument rests on the notion that a D.C. Superior Court judge, lacking life tenure and salary protections, is less able to curb federal prosecutorial abuses than his United States District Court counterpart. We think this notion

is questionable at best. *See Palmore v. United States*, 411 U.S. 389, 402, 93 S. Ct. 1670, 1678, 36 L. Ed.2d 342 (1973) ("Nor, more particularly, has the enforcement of federal criminal law been deemed the exclusive province of federal Art. III courts. Very early in our history, Congress left the enforcement of selected federal criminal laws to state courts and to state court judges who did not enjoy the protections prescribed for federal judges in Art. III."); *cf. Testa v. Katt*, 330 U.S. 386, 67 S. Ct. 810, 91 L. Ed. 967 (1947) (Supremacy Clause required Rhode Island trial court to enforce non-penal provisions of federal penal price control statute). The delegation of certain Article III powers to United States magistrate judges, who are not Article III judges, has also been upheld. *See, e.g., Peretz v. United States*, 501 U.S. 923, 937, 111 S. Ct. 2661, 2669-70, 115 L. Ed.2d 808 (1991) (structural constitutional protection not abrogated by allowing magistrate to conduct voir dire); *United States v. Raddatz*, 447 U.S. 667, 683, 100 S. Ct. 2406, 2416, 65 L. Ed.2d 424 (1980) (delegation of suppression hearing to magistrate did not violate Article III or Due Process Clause so long as Article III court retained final authority). Moreover, the Supreme Court has held that a D.C. Superior Court judge is presumed competent to pass on federal constitutional questions that may arise in the course of a criminal trial. *See Swain v. Pressley*, 430 U.S. 372, 383, 97 S. Ct. 1224, 1230-31, 51 L. Ed.2d 411 (1977) ("[T]he judges of the Superior Court of the District of Columbia must be presumed competent to decide all issues, including constitutional issues, that routinely arise in the trial of criminal cases.").[8]

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[8] We do not here conclude that there are no constitutional limitations on the Congress's authority to delegate either grand jury supervisory functions or federal felony trial supervisory powers to state and Article I judges, as controlling precedent suggests that, in at least some instances, a non-consenting defendant may have a personal constitutional claim to adjudication by an Article III judge. *See Gomez v. United States*, 490 U.S. 858, 872 n. 25, 109 S. Ct. 2237, 2246, 104 L. Ed.2d 923 (1989); *Peretz*, 501 U.S. at 936, 111 S. Ct. at 2669 ("[I]t is arguable that a defendant in a criminal trial has the right to demand the presence of an Article III judge at voir dire."). Even if a defendant has such a constitutional right to Article III *adjudication*, it is far from clear that he has a corresponding right to indictment under

The appellants' challenge requires us to assess the "practical effect" of the alleged infringement of Article III power:

> [I]n reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to *the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary* . . . . Among the factors upon which we have focused are [1] the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, [2] the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, [3] the origins and importance of the right to be adjudicated, and [4] the concerns that drove Congress to depart from the requirements of Article III.

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851, 106 S. Ct. 3245, 3257, 92 L. Ed.2d 675 (1986) (emphasis added). Applying the Schor test here, we conclude that section 1916(a) does not abrogate Article III structural protections.[9]

Article III supervision. Further, because the grand jury conducts its proceedings *ex parte*, it would be difficult (if not impossible) to obtain the accused's consent to non-Article III supervision without altering the fundamental and independent role of the grand jury in the investigative and indictment process – something *Williams* plainly proscribes. *See Williams*, 504 U.S. at 52-55, 112 S. Ct. at 1744-46 (rejecting judicial rule requiring presentation of exculpatory evidence to grand jury because it would "alter the grand jury's historical role").

[9] While *Schor* addressed the constitutionality of the Commodity Futures Trade Commission's power to decide a state-law counterclaim in an administrative reparation proceeding, there is no reason that the structural constitutional analysis should be any different in the criminal context. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 382-83, 109 S. Ct. 647, 660-61, 102 L. Ed.2d 714 (1989) (citing *Schor* in describing separation of powers analysis to be applied in determining constitutionality of grant of authority to Sentencing Commission to set mandatory minimum punishments for criminal violations of U.S. Code).

First, as discussed earlier, the power to supervise a federally-competent grand jury cannot fairly be described as an "essential attribute" of the "judicial power of the United States." The limited authority a supervising judge wields, the independence of the grand jury from both the judicial and executive branches, as well as the fact that such supervisory responsibilities are often discharged by a magistrate judge (without requiring the accused's consent) – all manifest that the supervisory power at issue is not an "essential attribute" of the "judicial power of the United States." *See generally Williams*, 504 U.S. at 47-55, 112 S. Ct. at 1742-46.

Second, even if supervision of a federally-competent grand jury qualified as an "essential attribute," section 1916(a) authorizes only a limited sharing of the supervisory power with an Article I court. An Article III judge continues to preside at the defendant's trial and retains his authority to dismiss an indictment. *Cf. Bank of Nova Scotia v. United States*, 487 U.S. 250, 254, 108 S. Ct. 2369, 2373, 101 L. Ed.2d 228 (1988) ("We hold that, as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants."); *United States v. Raddatz*, 447 U.S. 667, 683, 100 S. Ct. 2406, 2416, 65 L. Ed.2d 424 (1980) (delegation of authority to conduct suppression hearing to magistrate judge "does not violate Article III so long as the ultimate [suppression] decision is made by the district court").

Third, while indictment or presentment by a grand jury is a right secured to felony defendants by the Fifth Amendment, the history and origins of the grand jury suggest that any constitutional right to have it supervised by an Article III judge is of much more recent vintage:

> The grand jury is an English institution, brought to this country by the early colonists and incorporated into the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand

> jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. *It acquired an independence in England free from control by the Crown or judges.*

Costello v. United States, 350 U.S. 359, 362, 76 S. Ct. 406, 408, 100 L. Ed. 397 (1956) (emphasis added); *accord Hurtado v. California*, 110 U.S. 516, 530, 4 S. Ct. 111, 118 (1884) ("When we add to this that the primitive grand jury heard no witnesses in support of the truth of the charges to be preferred, but presented upon common fame and general suspicion, we shall be ready to acknowledge that it is better not to go too far back into antiquity for the best securities for our 'ancient liberties.'"). Thus, the grand jury's reliance on a judge for subpoenas, immunity orders and the like is a relatively recent development in the history of the institution, resulting, no doubt, from proscribing the jurors' reliance on personal knowledge of events in the vicinage to form their opinions. *Cf.* Edward J. Finley II, Note, *Ignorance as Bliss? The Historical Development of an American Rule on Juror Knowledge*, 1990 U. Chi. Legal F. 457, 468 (jurors' use of personal knowledge not prohibited by many states until end of nineteenth century); *see also Badders*, 240 U.S. at 394-95, 36 S. Ct. at 368 (1916) (finding no error, constitutional or otherwise, in district judge's absence from District during grand jury deliberation).

Fourth, section 1916(a) promotes efficiency resulting from the identity (both in composition and function) of the D.C. Superior Court grand jury and the federal grand jury:

> [G]rand jurors for both the District Court and the Superior Court are selected from the same pool of names, by the same jury commissioners, by use of the Superior Court computer, and pursuant to an identical method. Moreover the grand jurors in the two courts have identical qualifications and it is only by chance that a person may be selected to serve on one grand jury rather than the other. The grand jury procedure is virtually identical in both.

Hackney v. United States, 389 A.2d 1336, 1340 (D.C.1978), *cert. denied*, 439 U.S. 1132, 99 S. Ct. 1054, 59 L. Ed.2d 95 (1979). In addition, the provision immediately following section 1916 directs:

> To the extent feasible, the Superior Court and the United States District Court shall consider the respective needs of each court in the qualification, selection, and service of jurors. Nothing in this chapter shall be construed to prevent such courts from entering into any agreement for sharing of resources and facilities (including automated data processing and hardware and software, forms, postage, and other resources).

D.C. Code Ann. § 11-1917 (1981 & Supp. 1995). Given the limited pool of potential jurors available to serve both the D.C. Superior Court and the United States District Court, it is hardly surprising that the Congress should vest a grand jury empaneled by either court with authority to return an indictment in the other or that judicial supervisory authority should be shared by the courts. *See Atkinson v. United States*, 295 A.2d 899, 901-02 (D.C.1972) (observing that as of February 1971, grand jury sitting in one court could return indictment to other court). While the grand jury arrangement in the District of Columbia may be unique, "[o]ur constitutional principles of separated powers are not violated . . . by mere anomaly or innovation." *Mistretta v. United States*, 488 U.S. 361, 385, 109 S. Ct. 647, 661, 102 L. Ed.2d 714 (1989).

The two cases Seals and Sweatt rely on do not suggest a different conclusion. They first cite *O'Donoghue v. United States*, 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356 (1933), in which the Supreme Court upheld the classification of District of Columbia courts as Article III courts because (1) the Congress did not expressly denominate them Article I tribunals, (2) the Congress consistently treated them like other Article III courts, (3) it vested them with broad powers to determine matters under national laws and (4) they were the only courts to which District of Columbia residents could turn to protect their federal statutory rights. *See* 289 U.S. at 534-35, 544-49, 53 S. Ct. at 744-45, 748-50; *cf. Palmore*, 411 U.S. at 405-07, 93 S. Ct. at 1680-81 (*O'Donoghue* "[r]el[ied] heavily on congressional intent" to uphold D.C. courts as Article III courts). Some forty-one

years later, after the Congress established separate Article I and Article III courts in the District of Columbia, the Supreme Court held that Article III did not prohibit the Congress from authorizing D.C. Superior Court judges to hear federal criminal cases brought under corresponding provisions of the D.C. Code. *Palmore*, 411 U.S. at 389, 93 S. Ct. at 1672. Accordingly, *O'Donoghue* offers the appellants no support for their challenge.

Second, the plurality opinion in *Northern Pipeline* does not support the appellants.[10] In that opinion, Justice Brennan likened the Congress's plenary Article I authority over the District of Columbia to its authority over territorial matters pursuant to Article IV and, with three other justices, held that, with respect to such enclaves, "the general principle of independent adjudication commanded by Art. III *does not apply*." 458 U.S. at 76, 102 S. Ct. at 2874 (emphasis added).

(3) *Other Considerations*

The line of cases confirming the Congress's plenary authority over the District of Columbia pursuant to Article I, § 8, cl. 17, further fortifies our holding today.[11] In particular, *Palmore* recognizes that "[i]t is apparent that the power of Congress under Clause 17 permits

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[10] The precedential value of *Northern Pipeline*, which did not produce a majority opinion, has been subsequently weakened. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584, 105 S. Ct. 3325, 3334-35, 87 L. Ed.2d 409 (1985) ("The Court's holding in [*Northern Pipeline*] establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action *arising under state law*, without the consent of the litigants, and subject only to ordinary appellate review.") (emphasis added); *cf. Fields v. Washington Metro. Area Transit Auth.*, 743 F.2d 890, 894 n.10 (D.C. Cir. 1984).

[11] Article I, § 8, cl. 17, in relevant part provides:

[The Congress shall have Power] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of the Congress, become the Seat of the Government of the United States. . . .

it to legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Art I. . . ." 411 U.S. at 397-98, 93 S. Ct. at 1676. Subsequently, the plurality opinion in *Northern Pipeline* went even further in describing the extent of the Congress's plenary authority under Article I, § 8, cl. 17: "Congress' power over the District of Columbia *encompasses the full authority of the government, and thus, necessarily, the Executive and Judicial powers as well as the Legislative*." 458 U.S. at 76, 102 S. Ct. at 2874 (emphasis added).

Moreover, we cannot find in the Fifth Amendment any basis for concern regarding the assignment of the grand jury supervisory function to a non- Article III judge. Instead, we conclude that if a D.C. Superior Court judge is competent, despite lacking life tenure and salary protections, to adjudicate a constitutional right as fundamental as that guaranteed by the writ of habeas corpus – *see Swain*, 430 U.S. at 383, 97 S. Ct. at 1230-31– we see no reason that the same judge cannot likewise protect whatever Fifth Amendment right the appellants might have to indictment by a federally-competent grand jury supervised by an impartial and independent judge.

C. SWEATT'S KIDNAPPING CONVICTION

The federal kidnapping statute, in relevant part, provides:

> Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, *when* –
>
> (1) the person is willfully transported in interstate or foreign commerce;
>
> (2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;
>
> (3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 46501 of title 49;

> (4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title; or
>
> (5) the person is among those officers and employees designated in section 1114 of this title and any such act against the person is done while the person is engaged in, or on account of, the performance of official duties;
>
> shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

18 U.S.C. § 1201(a) (emphasis added). Sweatt contends that the word "when" as used in section 1201(a) means that the kidnapping ended after the victim was transported across state lines and before he became involved in holding the victim and retrieving the ransom.[12] He therefore reasons that he cannot be held criminally liable as a principal, aider and abettor or Pinkerton co-conspirator under 18 U.S.C. § 1201(a). He is mistaken.

Sweatt's crabbed reading of section 1201(a) is contrary to the "natural meaning" of the term "when." *See United States v. Wells*, — U.S. —, —, 117 S. Ct. 921, 927, 137 L. Ed.2d 107 (1997) ("the first criterion in the interpretive hierarchy, a natural reading of the full text") (*citing United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 542- 43, 60 S. Ct. 1059, 1063-64, 84 L. Ed. 1345 (1940)). The term "when" is used in section 1201(a) not in its temporal sense – i.e., "at the time that"– but rather in its categorical sense – i.e., "in cases where." This is evident from the syntax and structure of the provision: the list of factors immediately following "when" describes activities the provision intends to forbid, not their chronology.

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[12] According to the Government's evidence, Sweatt assisted in holding the victim in Maryland while the ransom demand was made and he and Seals traveled to the District of Columbia to pick up the ransom. *See* Trial Tr. 612-14, 619-20, 709-10, 1156, 1171. There was also evidence that a telephone call was placed to Sweatt shortly after the victim was abducted. *Id.* at 713-16.

Moreover, if "when" had the meaning Sweatt ascribes to it, the word "while" in subsection (5) of section 1201(a) would be superfluous – again, a disfavored construction. *See Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S. Ct. 391, 394-95, 27 L. Ed. 431 (1883) (courts should "give effect, if possible, to every clause and word of a statute"); *cf. Moskal v. United States*, 498 U.S. 103, 111, 111 S. Ct. 461, 466-67, 112 L. Ed.2d 449 (1990) (declining to read provision narrowly so as to "limit it to *instances of fraud* rather than the *class of fraud* encompassed by its language") (emphasis added); *Bell v. United States*, 462 U.S. 356, 362, 103 S. Ct. 2398, 2402, 76 L. Ed.2d 638 (1983) ("[F]ederal criminal statutes that are intended to fill a void in local law enforcement should be construed broadly.").

Other courts have held that, even though a violation of 18 U.S.C. § 1201(a) occurs when all of the essential elements of the offense have been satisfied, the crime of kidnapping continues while the victim remains held and a ransom sought. *See United States v. Denny-Shaffer*, 2 F.3d 999, 1018 (10th Cir. 1993) ("The broad language of s 1201(a) defines a continuing offense."); *cf. United States v. Garcia*, 854 F.2d 340, 344 (9th Cir. 1988) (federal kidnapping is continuing offense and therefore statute of limitations does not begin with transport of victim across state lines), *cert. denied*, 490 U.S. 1094, 109 S. Ct. 2439, 104 L. Ed.2d 995 (1989); *cf. also Grunewald v. United States*, 353 U.S. 391, 403, 77 S. Ct. 963, 974, 1 L. Ed.2d 931 (1957) ("Kidnapers in hiding, waiting for ransom, commit acts of concealment in furtherance of the objectives of the conspiracy itself, just as repainting a stolen car would be in furtherance of a conspiracy to steal; in both cases the successful accomplishment of the crime necessitates concealment.") (note omitted); *see also McElroy v. United States*, 455 U.S. 642, 654-56, 102 S. Ct. 1332, 1339-40, 71 L. Ed.2d 522 (1982) (rejecting, as contrary to statute's purpose of aiding in apprehension of criminals who misuse channels of interstate commerce, argument that federal forgery conviction must be overturned because prosecutor had failed to establish instrument was forged before transport across state lines); *United States v. Toledo*, 985 F.2d 1462, 1467 (10th Cir.) (in enacting section 1201(a) "Congress was attempting to address the misuse of interstate commerce by kidnappers to frustrate the efforts of state police"), *cert.*

denied, 510 U.S. 878, 114 S. Ct. 218, 126 L. Ed.2d 174 (1993). Accordingly, there was sufficient evidence to convict Sweatt as at least an aider and abettor – which is all that is required to sustain his conviction. *See Griffin v. United States*, 502 U.S. 46, 49, 112 S. Ct. 466, 469, 116 L. Ed.2d 371 (1991) ("[A] general jury verdict [is] valid so long as it [is] legally supportable on one of the submitted grounds . . . .").

Nor do the cases Sweatt cites compel a different conclusion. The cases hold only that unlawful abduction and transport across state lines is sufficient to violate section 1201(a); they do not hold, nor does it follow from their holdings, that the kidnapping concludes once the abduction and transport occur. *See, e.g., United States v. Broadwell*, 870 F.2d 594, 601 & n.16 (11th Cir.) (holding that unlawful restraint began when victim was abducted and "continued" after he was transported across state lines even though crime "complete" upon transport), *cert. denied*, 493 U.S. 840, 110 S. Ct. 125, 107 L. Ed.2d 85 (1989). Accordingly, we uphold Sweatt's conviction on the kidnapping charge. [13]

D. SWEATT AS "CAREER OFFENDER" UNDER SECTION 4B1.1

We held in *United States v. Price*, 990 F.2d 1367 (D.C. Cir.1993), that "the Sentencing Commission adopted ss 4B1.1 & 4B1.2 solely in

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[13] We express no opinion regarding the Government's and Sweatt's opposing arguments as to his culpability on a *Pinkerton* theory. We also note that although the trial court's charge, in describing the elements of kidnapping required to convict Seals and Sweatt as principals, declared that Sweatt could not be convicted unless he was shown to have participated in the abduction or transport of the victim across state lines (Trial Tr.1926), the aiding and abetting charge (*id.* at 1917-19) contained no such limitation and could have been used by a reasonable jury to convict Sweatt of kidnapping. *See Griffin*, 502 U.S. at 49, 112 S. Ct. at 469. In any event, although we need not reach the issue today, we doubt that a criminal defendant can obtain reversal of his conviction solely on the basis of instructions that create erroneous and unnecessary impediments to conviction. *See United States v. Bomski*, 125 F.3d ~~111~~5, 1116 (7th Cir. 1997).

an effort to fulfill the mandate of 28 U.S.C. § 994(h)" and therefore only those offenses specified in section 994(h) can render the defendant a "career offender." 990 F.2d at 1368. Because aiding and abetting, conspiring and attempting to commit certain narcotics offenses are not among those offenses listed in section 994(h), we held that the defendant could not be sentenced as a career offender on the basis of prior convictions of those offenses. *Id.* Price concluded that Application Note 1 to section 4B1.2 of the Guidelines was invalid to the extent it suggested that convictions of certain inchoate offenses counted in treating the defendant as a career offender. *Id.* We held open the question, however, whether the Sentencing Commission could repromulgate Application Note 1 pursuant to statutory authority other than section 994(h), including its discretionary authority under section 994(a). *See id.* at 1370 ("Thus, without passing on the Commission's authority to re-adopt Application Note 1 to § 4B1.2 (or some variation of Note 1) on alternative grounds, we vacate the sentence and remand the case to the district court for resentencing.").

The Commission responded by amending and repromulgating the Background Commentary to section 4B1.1 of the Guidelines. The repromulgated version clarified that, pursuant to the Commission's general statutory authority, 28 U.S.C. § 994(a)-(f), and its amendment authority, 28 U.S.C. § 994(o)-(p), prior convictions that can count toward career offender status include convictions of attempts, aiding and abetting and other inchoate offenses. *See* 1995 Guidelines Manual, App. C, Am. 528 at 434-35. The repromulgated Background Commentary to section 4B1.1 became effective on November 1, 1995.

Sweatt argues that in light of *Price*, the district court improperly sentenced him as a career offender under the repromulgated version of section 4B1.1 because his 1987 conviction of attempted distribution of heroin could not be used under the November 1994 version of section 4B1.1 – the version in effect when he committed the crimes.[14] By retroactively applying the November 1995 version of section 4B1.1, he reasons, the trial court imposed a greater punishment than

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[14] Sweatt does not dispute that his 1987 robbery conviction was properly counted as a prior conviction under section 4B1.1.

it could have imposed under the law as it existed when the crimes were committed, violating the *Ex Post Facto* Clause. *See, e.g., United States v. Stover*, 93 F.3d 1379, 1386 (8th Cir. 1996); *United States v. Smallwood*, 35 F.3d 414, 417-18 n. 18 (9th Cir. 1994); *United States v. Saucedo*, 950 F.2d 1508, 1515 (10th Cir. 1991).

The Government essentially concedes that Sweatt's reading of *Price* is correct but it contends that we should overrule *Price*. *See* Appellee Br. at 43. Nevertheless, the law is well settled that one panel may not "overrule the decision of another panel of this court." *United States v. Doe*, 730 F.2d 1529, 1531 n. 2 (D.C. Cir. 1984). Accordingly, we vacate Sweatt's sentence as a career offender pursuant to section 4B1.1 of the Guidelines and remand to the district court for resentencing. *See supra* note 1.

III. CONCLUSION

For the foregoing reasons, we affirm the appellants' convictions. We vacate appellant Sweatt's sentence as a career offender and remand for resentencing in accordance with the terms of this opinion.

So ordered.

[105] **UNITED STATES DISTRICT COURT**
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	Docket Number: CR 95-284
Government,	:	
v.	:	Washington, D.C.
WILLIAM BROOKS,	:	Monday, May 6, 1996
WILLIE L. YELVERTON,	:	
GARY W. SWEATT,	:	9:09 a.m.
THEODORE Z. EDELIN,	:	
Defendants.	:	

TRANSCRIPT OF PRETRIAL MOTIONS
BEFORE THE HONORABLE ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

DAY 2

* * * * *

[200] The Court: All right. As to the Motion to Dismiss [201] for Lack of Jurisdiction, I find that the Congress had plenary authority over D.C., that the analysis set forth by the D.C. Court of Appeals in *Hackney* is proper, and I adopt it, that the grand jurors are selected from the same pool by the same basic method, that the statute is not unconstitutional, and that the defendants can cite no specific harm other than a possible speedy trial harm, which I'll address in the separate Speedy Trial Motion.

I also note that Judge Gesell, in dicta, in the case of *United States v. Allen*, assessed this and relied on *Hacknev*, saying it carried considerable weight. And so the question is not a new one in this court, although no counsel has cited any authority by the D.C. Circuit. But I am satisfied that the Superior Court Grand Jury can constitutionally, under the scheme set forth by Congress where they have plenary authority over D.C., return an indictment in this court as

they have done in this case. So the Motion to Dismiss for Lack of Jurisdiction is denied.

* * * *

[Feb. 10, 1998]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-3108 **September Term, 1997**

United States of America, 95cr00284-01
Appellee 95cr00284-03

v.

William H. Seals, *a/k/a* Puddin,
a/k/a William Brooks,
Appellant

Before: WILLIAMS, GINSBURG AND HENDERSON, *Circuit Judges*.

ORDER

Upon consideration of appellant's peition for rehearing filed January 20, 1998, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT
Mark J. Langer, Clerk

BY:/s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Article I, § 8, cl. 17

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; . . . .

D.C. Code § 11-703. Judges; service; compensation.

(a) The chief judge and the judges of the court shall serve in accordance with Chapter 15 of this title.

(b) Judges of the court shall be compensated at the rate prescribed by law for judges of the United States courts of appeals. The chief judge, while serving in that position, shall receive an additional $500 per annum.

D.C. Code § 11-501. Appointment and qualifications of judges.

(a) The President of the United States shall nominate, and by and with the advice and consent of the Senate, shall appoint all judges of the District of Columbia courts. The President shall have power to fill all vacancies that may occur in those courts during a recess of the Senate, by granting commissions which shall expire at the end of the next session of the Senate.

(b) A person may not be appointed a judge of a District of Columbia court unless that person —

(1) is a citizen of the United States;

(2)(A) is a member of the bar of the District of Columbia and (B) (i) has been a member of such bar for a period of at least five

years, or (ii) in the case of a professor of law in a law school in the District of Columbia or of an attorney employed in the District of Columbia by the United States or the District of Columbia, has been eligible for membership in the bar of the District of Columbia for at least five years prior to appointment;

(3) has been actively engaged, for at least five of the ten years immediately prior to appointment, as an attorney in the practice of law in the District of Columbia, as a judge of a District of Columbia court, as a professor of law in a law school in the District of Columbia, or as an attorney employed in the District of Columbia by the United States or the District of Columbia; and

(4) is a bona fide resident of the area consisting of the District of Columbia, Montgomery and Prince George's Counties in Maryland, Arlington and Fairfax Counties (and any cities within the outer boundaries thereof) and the city of Alexandria in Virginia and has maintained an actual place of abode in such area for at least five years prior to appointment.

During term of service and for one year after the termination thereof, no member of the District of Columbia Commission on Judicial Disabilities and Tenure shall be eligible for nomination or appointment to a District of Columbia court.

D.C. Code § 11-1502. Tenure.

Subject to mandatory retirement at age 74 and to the provisions of subchapters II and III of this chapter, a judge of a District of Columbia court appointed on or after the date of enactment of the District of Columbia Court Reorganization Act of 1970 shall serve for a term of fifteen years, and upon completion of such term, such judge shall continue to serve until the judge's successor is appointed and qualifies.

D.C. Code § 11-1521. Establishment of Commission.

There shall be a District of Columbia Commission on Judicial Disabilities and Tenure (hereafter in this subchapter referred to as the "Commission"). The Commission shall have power to suspend, retire, or remove a judge of a District of Columbia court, as provided in this subchapter.

D.C. Code § 11-1916. Grand jury; additional grand jury.

(a) A grand jury serving in the District of Columbia may take cognizance of all matters brought before it regardless of whether an indictment is returnable in the Federal or District of Columbia courts.

(b) If the United States Attorney for the District of Columbia certifies in writing to the chief judge that an additional grand jury is required, the judge may in his or her discretion order an additional grand jury summoned which shall be drawn at such time as he or she designates. Unless discharged by order of the judge, the additional grand jury shall serve until the end of the term for which it is drawn.